SUPREME COURT, U. S.

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MICHAEL RODAK, JR., C

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-369

WEIDINGER CHEVROLET, INC.,
Petitioner,

v.

UNIVERSAL C.I.T. CREDIT CORPORATION.
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Your Petitioner, Weidinger Chevrolet, Inc., respectfully prays to this Honorable Court that a writ of certiorari be issued to the United States Court of Appeals for the Eighth Circuit to review a judgment of that Court on July 31, 1974, reversing an opinion and judgment of the United States District Court for the Southern Division of the Western District of Missouri,

rendered on June 27, 1973; and an Order of the United States Court of Appeals for the Eighth Circuit entered on August 21, 1974.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not reported. A copy of the opinion and judgment is attached to this Petition and may be found in Appendix A, infra. The opinion of the District Court for the Southern Division of the Western Judicial District of Missouri is attached to this petition and may be found in Appendix B. A copy of the Order denying Petitioner's Motion for rehearing is attached to this Petition and may be found in Appendix C. A copy of the Order Staying Issuance of Mandate for Thirty Days entered September 3, 1974, is attached to this Petition and may be found in Appendix D.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit reversing the judgment of the United States District Court for the Southern Division of the Western District of Missouri was entered July 31, 1974, and dated as of that date. The Order of the Court of Appeals denying the Petition for Rehearing en banc or for Rehearing was entered by the Court of Appeals on August 21, 1974. The order staying issuance of mandate for thirty days was entered September 3, 1974. The opinion of the United States Court of Appeals for the Eighth Circuit presents novel and serious constitutional questions under the due process clauses of the Fourteenth Amendment to the Constitution of the United States. The decision of the United States Court of Appeals for the Eighth Circuit is probably not in accord with the applicable decisions of the Supreme Court of the United States. The Court of Appeals for the Eighth Cir-

cuit has rendered a decision in conflict with the decision of another Court of Appeals on the same matter. The Court of Appeals has decided an important state question in a way in conflict with applicable state law.

The jurisdiction of the Supreme Court of the United States is invoked under 28 USCA 1254 (1). This Petition is presented under and pursuant to the Federal Rules of Civil and Appellate Procedure and Rule 19 of the Supreme Court of the United States of America.

This Petition is accompanied by a certified copy of the record of all of the proceedings in the Court of Appeals including the decision Petitioner seeks to have reviewed and including the Appendix (or record) filed in the Court of Appeals, and by a supporting brief.

QUESTIONS PRESENTED FOR REVIEW

1. Does the opinion of the United States Court of Appeals for the Eighth Circuit present novel and serious constitutional questions under the due process clause of the Fourteenth Amendment?

2. Is the decision of the United States Court of Appeals for the Eighth Circuit probably not in accord with the applicable decision of the Supreme Court of the United States?

3. Has the Court of Appeals for the Eighth Circuit rendered a decision in conflict with the decision of another Court of Appeals on the same matter?

4. Has the Court of Appeals decided an important state question in a way in conflict with applicable state law?

5. Did Respondent have a lien on the 22 automobiles when they were seized by Writs of Attachment and Replevin?

6. Is Respondent estopped to assert a lien on the 22 automobiles owned by petitioner?

7. Did respondent waive its lien on the 22 automobiles owned by petitioner?

8. Was petitioner deprived of its property without due process of law and if so is petitioner entitled to recover the 22 automobiles or their value if return can not be had?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV, Section 1, Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section 100 Article 1 of the Constitution of Missouri for 1945, provides:

> "That no party shall be deprived of life, liberty or property without due process of law."

Section 521.050, RSMo. 1969 provides:

> "Any plaintiff wishing to sue by attachment may file in the clerk's office of the court in which the attachment is instituted, or with the magistrate before whom the suit is brought, a petition or other lawful statement or exhibit

of his cause of action, and, except in suits instituted by the state or a county in its own behalf, and also, except in cases where the defendant is not a resident of the state of Missouri, in either of which cases no bond shall be required, shall also file an affidavit and bond, and, thereupon, such plaintiff may sue out an original attachment, if in the circuit court, against the lands, tenements, goods, moneys, effects and credits of the defendant in whose hands soever the same may be; or if before a magistrate, against the goods, money, effects, and credits of the defendant, wheresoever found within the county; and where the affidavit for an attachment states that the plaintiff will lose his claim, unless the writ of attachment issues, and be served on Sunday or any other legal holiday, the writ may be issued and served on that day; provided, that when any writ of attachment has issued against a non-resident and the plaintiff has given no bond, the attachment shall be dissolved as of course, and the land, tenements, goods, moneys, effects and credits of the defendant taken or levied upon under such writ of attachment shall be released therefrom, upon the defendant entering his appearance and filing his answer to the merits of the case; unless the plaintiff shall, within ten days from the date of the filing and service of defendant's answer and entry of appearance, file his bond in said case in double the amount sworn to in the affidavit of the plaintiff; provided, however, upon good cause shown, the circuit judge may grant an additional ten days to file said bond; the bond herein provided for as to its effect and the obligation of the parties thereto shall be the same as if filed before the writ of attachment was issued."

Section 533.020 RSMo 1969, provides:

"Upon filing such affidavit, the court, or judge or clerk in vacation, shall make an order requiring the defendant

to deliver the property specified in the affidavit to the sheriff, and requiring the sheriff, if the same be not delivered to him, to take it from the defendant and deliver it to the plaintiff."

Section 400.236 RSMo 1969, provides in part:

"(1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is * * *

(b) a 'sale or return' if the goods are delivered primarily for resale.

(2) Except as provided in subsection (3) * * * goods held on sale or return are subject to such claims while in the buyer's possession.

(3) Where goods are delivered to a person for sale such person maintains a place of business at which he deals in goods of the kind involved, under a name other than the name of the person making delivery, then with respect to claims of creditors of the person conducting the business the goods are deemed to be on sale or return. The provisions of this subsection are applicable even though an agreement purports to reserve title to the person making delivery until payment or resale or uses such words as 'on consignment' or 'on memorandum.' However, this subsection is not applicable if the person making delivery

(a) complies with an applicable law providing for a consignor's interest or the like to be evidenced by a sign, or

(b) establishes that the person conducting the business is generally known by his creditors to be substantially engaged in selling the goods of others, or

(c) complies with the filing provisions of the article on secured transactions (article 9)."

Section 301.210 (1), RSMo. 1969, provides:

"In the event of a sale or transfer of ownership of a motor vehicle or trailer for which a certificate of ownership has been issued the holder of such certificate shall endorse on the same an assignment thereof, with warranty of title in form printed thereon, and prescribed by the director of revenue, with a statement of all liens or encumbrances on said motor vehicle or trailer and deliver the same to the buyer at the time of the delivery to him of said motor vehicle or trailer."

Section 301.600 (1) and (2) RSMo, 1969, provides:

"Unless excepted by section 301.650, a lien or encumbrance on a motor vehicle or trailer, as defined by section 301.010, is not valid against subsequent transferees or lienholders of the motor vehicle or trailer who took without knowledge of the lien or encumbrance unless the lien or encumbrance is perfected as provided in section 301.600 to 301.670."

"A lien or encumbrance on a motor vehicle or trailer is perfected by the delivery to the director of revenue of the existing certificate of ownership, if any, an application for a certificate of ownership containing the name and address of the lienholder and the date of his security agreement, and the required certificate of ownership fee. It is perfected as of the time of its creation if the delivery of the aforesaid to the director of revenue is completed within thirty days thereafter, otherwise as of the time of the delivery."

Section 301.650 RSMo, 1969, provides:

"1. Sections 301.600 to 301.670 do not apply to or affect:

(1) A lien given by statute or rule of law to a supplier of services or materials for the motor vehicle or trailer;

(2) A lien given by statute to the United States, this state or any political subdivision of this state;

(3) A lien or encumbrance on a motor vehicle or trailer created by a manufacturer or dealer who holds the motor vehicle or trailer for sale.

2. The method provided in sections 301.600 to 301.670 of perfecting and giving notice of liens or encumbrances subject to section 301.600 to 301.670 is exclusive."

STATEMENT OF THE CASE

In May, 1970, the petitioner filed in the District Court for the Southern Division of the Western District of Missouri, its First Amended Complaint seeking $34,145.00 with interest and costs for conversion of twenty-two (22) automobiles by respondent and seeking punitive damages in the amount of $100,000.00 (Tr pp. 4, 5). The respondent filed an Answer and Counter Claim (Tr pp. 6, 7). Petitioner filed a Reply (Tr pp. 8, 9). Judgment was for petitioner for $41,490.00 (Tr p. 32). Notice of Appeal was filed by respondent on September 6, 1973 (Tr p. 33).

It was admitted that when respondent entered into a new car floor plan agreement with Jimmy Swanson, the respondent knew Swanson had entered into a used car floor plan agreement with GMCO and respondent did not intend to floor plan used cars with Jimmy Swanson (Tr p. 13) and further admitted that respondent consented to the sale of used motor vehicles owned by Swanson in the normal course of business. (Tr p. 14). It was further admitted that respondent deprived petitioner of possession of the twenty-two (22) motor vehicles under Writs of

Replevin and Writs of Attachment and Summons to Garnishee against the property and effects of Jimmy Swanson and petitioner was not made a party to the replevin action or the attachment action. (Tr p. 15). The trial Court found that in September, 1964, GMCO entered into a floor plan agreement with Swanson, a second hand car dealer and "floor planned" his stock of used cars from then until the situation arose which caused this suit. (Tr p. 27). The trial Court found that at the time Swanson entered into the agreement with the respondent, respondent had full knowledge that Swanson was financing used cars with GMCO; that respondent refused to furnish financing of Swanson's used car inventory; and that there was no question that after this refusal respondent had full knowledge that Swanson was floor planning his second hand cars with GMCO and the respondent made no objection to this continuing arrangement between GMCO and Swanson. The trial Court also found that the evidence showed that it is not unusual for one second hand car dealer to have a car for sale on another dealer's lot, and to pay a commission to the other dealer if he sold the car. (Tr p. 28).

The trial Court also found that all twenty-two (22) cars in question had been floor planned for Swanson by GMCO; and that there was absolutely no evidence to support the contention that the sale of cars by Swanson to petitioner was fraudulent. The trial Court specifically found that these transactions were legitimate, arms length dealing between the parties involved. (Tr p. 29).

The trial Court also found that for over a year and a half after the financing agreement with Swanson, the respondent knew that he was actively engaged in the second had car business, since he had three used car lots; that respondent never asked Swanson to account for any of the proceeds of the sale of a single used car during that entire period of time, nor did respondent investigate whether Swanson was selling the cars in

the "ordinary course of business" at retail, to individuals, or in wholesale lots to other dealers; that respondent knew that Swanson was borrowing money on all his second hand car inventory from GMCO; and that respondent made inquiries as to whether Swanson was paying promptly. The trial Court said it would be inclined to find that by this course of dealing, the respondent had waived its lien entirely by treating Swanson's used car business as completely separate from the new car business which respondent was financing. The trial Court said it could certainly be argued that by this course of conduct the respondent would be estopped from asserting a lien against a party in the shoes of the petitioner who knew of the conduct of the respondent. (Tr p. 30).

GMCO floor planned all of the twenty-two (22) automobiles involved in this suit for Swanson Chrysler Plymouth. (Tr p. 38). GMCO had floor planned twenty-three (23) automobiles with Swanson which petitioner assumed (one of which is not involved in law suit). (Tr p. 41). Petitioner was the holder of the titles of all the twenty-two (22) automobiles which are involved in this law suit, when the automobiles were seized by the respondent. (Tr p. 65). Used car dealers frequently have other automobiles on their lot for sale. (Tr p. 67). The district manager for respondent told Swanson that respondent definitely didn't finance floor planned used cars. (Tr p. 83). Swanson informed the district manager that he had been floor planning used cars with GMCO and that was when the district manager of the respondent told Swanson that respondent did not finance used cars and when Swanson told respondent that he intended to continue floor planning with GMCO. (Tr p. 34).

Agents of the respondent checked Swanson's new car inventory. They did not check on the used cars he had on the lot and they had no interest in the used cars and Swanson did not know of respondent's agents at any time checking on the used cars he had financed with GMCO and no agent of the respondent

ever asked Swanson if he had anybody else's used cars on the lot. (Tr p. 89).

Witness Carmichael was then district manager for respondent and negotiated the wholesale financing agreement with Swanson and understood the agreement with respondent was to floor plan new cars. (Tr p. 105). Respondent was not to finance used cars and respondent did not floor plan Swanson's used cars and at the time William Carmichael was working with Swanson he was aware that GMCO was floor planning Swanson's used cars. Carmichael told Swanson that respondent would not floor plan his used cars specifically since he was already floor planning used cars with GMCO. (Tr p. 85). Respondent allowed Swanson to continue the floor planning of used cars with GMCO when respondent obtained a personal guarantee from Swanson's father and after obtaining the personal guarantee, respondent allowed Swanson to go ahead with GMCO. From Carmichael's reports to respondent, respondent was aware that the St. Louis district office of respondent knew that respondent was not floor planning used cars and that GMCO was continuing to floor plan used automobiles. (Tr p. 107). It was stipulated that the twenty-two automobiles described in the complaint were seized under a writ of attachment or a writ of replevin issued against Swanson in which actions the petitioner was not a party. (Tr pp. 113, 114).

When a representative of the respondent would call at Swanson's to check, they did not check his used cars. (Tr p. 121).

The trial Court correctly stated to respondent's witness, Loretta Slavick, an accountant, that:

> "Everybody knew, you knew, C. I. T. knew, everybody knew that GMCO was floor planning the used car inventory and there was nothing on the financial statement to show what was owed." (Tr p. 133).

Respondent's witness Perry Clark said he never asked GMCO if they had floor planned any of the cars respondent was seizing. (Tr p. 152). Before respondent seized the automobiles at Rolla, respondent was informed that the automobiles belonged to petitioner and notwithstanding that information respondent proceeded to seize the automobiles and made no inquiry of the petitioner about the automobiles. (Tr. p. 153).

A witness for respondent said respondent was interested in Swanson's equity in the used cars but did not inquire of GMCO how much lien they had on the floor plan. (Tr. p. 155).

The District Court awarded petitioner $41,490.00 and taxed the cost to respondent. (Tr p. 3). The Court found that Swanson was a used car dealer in general; that they usually have other automobiles on the lot; and that Mr. Swanson, at any given time has cars on the lot for sale. (Tr pp. 67, 68).

The Court of Appeals reversed the judgment of the District Court, holding that the sales by Swanson to petitioner were in the ordinary course of business and that petitioner acquired the twenty-two (22) automobiles free of security interest of respondent. (Tr pp. 7, 8, Vol. II). The Court of Appeals reversed the judgment of the District Court holding that the twenty-two (22) cars, although owned by petitioner, were in possession of respondent and deemed to be "sale or return" and hence reinstated the lien of the wholesale financing agreement and respondent's security interest reattached to such cars and were subject to the lien rights of respondent. (Tr pp. 10, 11, Vol. II).

REASONS FOR GRANTING THE WRIT

I. The opinion of the United States Court of Appeals for the Eighth Circuit presents novel and serious constitutional questions under the due process clauses of the Fourteenth Amendment of the Constitution of the United States.

II. The decision of the United States Court of Appeals for the Eighth Circuit is probably not in accord with the applicable decision of the Supreme Court of the United States.

III. The Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decision of another Court of Appeals on the same matter.

IV. The Court of Appeals has decided an important state question in a way in conflict with applicable state law.

ARGUMENT

I

The Opinion of the United States Court of Appeals for the Eighth Circuit Presents Novel and Serious Constitutional Questions Under the Due Process Clauses of the Fourteenth Amendment of the Constitution of the United States.

The Court of Appeals says that by following the Missouri Replevin Statute Respondent was able to obtain possession of the twenty-two (22) automobiles without pre-seizure hearing. While apparently conceding that the seizure of the twenty-two (22) automobiles by Respondent was a violation of due process, the Court of Appeals refuses to pass upon the constitutionality of Missouri Replevin Statute and holds that the means of acquisition does not impair the validity of security interest. Ob-

viously this would nullify, for all practical purposes, the decision of this Court in *Fuentes v. Shevin*, 407 US 67 (1972).

We earnestly urge that it is in the public interest that this Court should, in unmistakable terms, declare whether the consolidated cases of *Fuentes v. Shevin*, 407 US 67, and *Parham v. American Continental et al.*, 407 U.S. 67, 92 S. Crt. 1973, 32 L Ed (2) 556, has been completely overruled by the recent opinion of this Court in *Lawrence Mitchell v. W. T. Grant*, decided May 13, 1974, — U.S. —, 92 L Ed (d) 406, 94 S. Crt. 1895. In *Fuentes*, supra, this Court held that the Replevin Statutes of the State of Florida and of the State of Pennsylvania, which are identical with Missouri Replevin Statutes, are invalid under the Fourteenth Amendment of the Constitution of the United States, since this works a deprivation of property without due process of law by depriving the right to prior opportunity to be heard before chattels are taken from the possessor.

In *McClellan v. Commercial Credit*, 350 F. Supp. 1013 (D. R.I. 1972), affirmed sub nom., *Georges v. McClellan*, 409 U.S. 1120 (1973), 93 S. Crt. 935, 41 L Wk. 3278, 35 L Ed (2) 253, this Court affirmed a decision of a three Judge Federal Court for the District of Rhode Island, holding that prejudgment attachment procedure pursuant to Rhode Island General Laws is unconstitutional and enjoined the attachment at issue of the two-named plaintiffs.

In *Mitchell v. Grant*, supra, Mr. Justice White, speaking for this Court, says:

> "But we are convinced that *Fuentes* was decided against a factual and legal background sufficiently different from that now before us and that it does not require the invalidation of the Louisiana sequestration statute, either on its face or as applied in this case." 94 S. Crt. 1904.

Mr. Justice Powell, in *Mitchell v. Grant*, supra, concurring in the majority opinion, says that he could have agreed that the Florida and Pennsylvania statutes in replevin were violative of due process because of the arbitrary and unreasonable provision and that he thinks the *Fuentes* opinion was too broad and inflexible. He says that narrower grounds existed for invalidating the replevin statutes in that case. 94 S. Crt. LC 1908.

In passing, we submit that the Missouri Replevin and Attachment Statutes set forth supra in our Constitutional and Statutory Provisions are in all respects similar to statutes of Pennsylvania, Florida and Rhode Island and should present at least narrower grounds for invalidating replevin and attachment statutes in Missouri.

The dissenting opinion in *Mitchell v. Grant*, supra, expresses the opinion that *Fuentes* is overruled by *Mitchell v. Grant*.

We earnestly urge that the position of this Court as to the rule announced in *Fuentes v. Shevin*, supra, should be clarified. Mr. Justice Stewart points out in his dissenting opinion,

> "In the short time that has elapsed from the time the case was decided, many state and federal courts have followed it in assessing the validity of state replevin statutes and other comparable state laws."

It was definitely followed by the Missouri Supreme Court in *State ex rel. Williams v. Berrey*, 492 S.W. 2d 731.

Assuming, for purposes of this argument, that *Fuentes v. Shevin* is completely overruled, Justice Powell says in his concurring opinion that narrower grounds existed for invalidating the replevin statutes in *Fuentes v. Shevin*, supra, then we submit that these narrower grounds still exist for invalidating the replevin statutes of Missouri. The holding of the Court of Appeals that if Respondent had acquired possession of the automobiles

through self-help, plaintiff could not have complained, is not supported by the previous opinions of the Court of Appeals relied upon for that proposition. In each of the previous decisions of the United States Court of Appeals for the Eighth Circuit, cited in foot note 13 of the opinion of the Court of Appeals, there had been no participation by a State officer. The only alleged state participation in all those cases was the fact that the legislatures of the states involved had enacted self-help statutes. In the case at bar, as admitted, the twenty-two (22) automobiles were seized by an officer under a writ of replevin and attachment and comes squarely within the purview of *Fuentes v. Shevin*, supra, if *Fuentes v. Shevin* is still the law of the land, or if it is overruled, then within the narrower grounds that existed in Fuentes v. Shevin, supra.

II

The Decision of the United States Court of Appeals for the Eighth Circuit Is Probably Not in Accord With the Applicable Decision of the Supreme Court of the United States.

In refusing to pass upon the constitutionality of the Missouri Replevin Statute, which is identical in its terms with the Replevin Statute involved in *Fuentes v. Shevin*, supra, and in *McClellan v. Commercial Credit Corporation*, 350 Fed. Supp. 1013 (D. R. I. 1972) affirmed sub nom, *Georges v. McClellan*, 409 U.S. 1120 (1973) the decision of the Court of Appeals is probably not in accord with the applicable decision of the Supreme Court.

We incorporate by reference what we have said under point I of this Argument. In *Fuentes v. Shevin*, supra, and in *McClellan v. Commercial Credit Corporation*, supra, the state statutes were declared unconstitutional. As said by Mr. Justice Powell, narrower grounds existed for invalidating the replevin statutes of Pennsylvania and Georgia, we submit that the same narrower grounds still exist for invalidating the Replevin and Attachment Statutes of Missouri.

III

The Court of Appeals for the Eighth Circuit Has Rendered a Decision in Conflict With the Decision of Another Court of Appeals on the Same Matter.

The Court of Appeals for the Eighth Circuit, in its opinion, holds, in effect, that the Uniform Commercial Code prevails over the Missouri Vehicle Statute, 301.210. The United States Court of Appeals for the Third Circuit *In Re Manufacturers Credit Corporation*, 441 Fed (2) 1313, decided April 12, 1971, holds to the contrary. In that case, the Third Circuit, at page 1317, of its opinion, sets forth the provisions of New Jersey's Uniform Commercial Code which provides for the filing of a security interest on a motor vehicle, and holds that its provisions, and not those of the New Jersey Uniform Commercial Code, govern the proper method of filing a lien on a motor vehicle. The Missouri section of the Uniform Commercial Code is identical with the New Jersey section, and Missouri Statutes providing for perfection of a lien on a motor vehicle are the same as in New Jersey. The Third Circuit held that the special motor vehicle statute governs on the perfection of liens on motor vehicles and not provisions of Commercial Code. That, we submit, is contrary to the ruling of the Court of Appeals in the case at bar, wherein they hold that by merely leaving the automobiles on the lots of Swanson, the wholesale financing agreement of Respondent attached to the twenty-two (22) automobiles.

Respondent's floor plan agreement with Swanson does not apply to new vehicles that are in fact sold by Swanson to someone else. The twenty-two (22) automobiles involved were sold by Swanson to Petitioner and certificates of title were delivered. There was no intention by Respondent in his wholesale financing agreement to have a lien on cars that are sold. Section 301.650 (3) RSMo, 1969, was put in primarily to allow dealers to get liens and have liens on new cars when no title had been

issued. The section was never meant to apply to any cars that Swanson sold. The Uniform Commercial Code's definition of sales does not apply to motor vehicles.

IV

The Court of Appeals Has Decided an Important State Question in a Way in Conflict With Applicable State Law.

Williams v. Berrey, 492 SW (2) 731, Supreme Court of Missouri, en banc, April 9, 1973, expressly holds that where chattels were seized by the constable without prior notice, without an opportunity to be heard, and without establishment of validity or probable validity of underlying claim therefor, the relator was deprived of possession of property in violation of due process clause of the Fourteenth Amendment to the Constitution of the United States of America and relator was entitled to be restored to possession of the chattels seized from relator. In the case at bar, it is admitted that the twenty-two (22) automobiles were seized under writs of replevin and attachment without prior notice to Petitioner and without opportunity to be heard. Nevertheless, the Court of Appeals for the Eighth Circuit has held to the contrary.

It is interesting to note that the Supreme Court of Missouri at page 735 of its opinion followed the rule announced by this Court in *Fuentes v. Shevin*, supra. In the case at bar, there is no dispute in the record but what the twenty-two (22) automobiles were seized by an officer under writs of replevin and writs of attachment issued against James Swanson and without any notice or opportunity to be heard before seizure.

We submit that the decision of the Court of Appeals in the case at bar is in direct conflict with the rule announced by the highest Court of the state of Missouri.

Certiorari may be granted to resolve a conflict between a Federal Court and the highest Court of a state. *Memorial Hospital v. Maracopa County*, 39 L Ed (d) 306, 312, 94 S. Crt. decided February 26, 1974.

In *O'Brien v. Skinner*, 38 L Ed (d) 702, 94 S. Crt. —, — U.S. — decided by this Court January 16, 1974, the Court said:

> "It is not our function to construe state statutes contrary to the construction given it by the highest Court of the State."

The opinion of the Court of Appeals for the Eighth Circuit is also in direct conflict with a decision of the Supreme Court of North Carolina in *Nationwide Mutual Insurance Company v. Hayes*, 174 SE 2d 511.

Respectfully submitted

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